SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. JARVONNE FEREDELL JONES, Defendant and Appellant.	)	S179552

Third Appellate District, No. C060376
Sacramento County Superior Court No. 08F04254
Honorable Jaime R. Roman, Judge

APPELLANT'S REPLY BRIEF ON THE MERITS

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REPLY BRIEF ON THE MERITS

I.

APPELLANT'S SENTENCE FOR POSSESSING A CONCEALED WEAPON SHOULD HAVE BEEN STAYED PURSUANT TO PENAL CODE SECTION 654.

Appellant and respondent agree the evidence in this case showed police detained appellant and found a loaded revolver behind the driver's side door panel of his car. Upon being questioned, appellant told police he bought the revolver three days earlier for protection, and that he had it in his car because he had just retrieved it from his grandmother's house. (ABOM pp. 2-3; RBOM pp. 2-3.)

Appellant has argued that, based on these facts, he could not separately be punished for violations of possession of a firearm by a felon

(Pen. Code, § 12021) and carrying an unregistered concealed firearm (Pen. Code, § 12025) because there was nothing in the record upon which the trial court might have rested a finding that defendant intended to actively use the firearm to commit a crime separate from the firearm possession offenses of which he was convicted.

In the Answer Brief on the Merits, respondent presents three theories as to why section 654 should not apply. First, respondent asserts that separate punishment for possession of a firearm by an felon and carrying a concealed weapon was proper because possession of the firearm was distinct and separate from the act of concealment, and that the possession offense was already complete when appellant concealed the weapon. (RBOM pp. 7-10.) Next, respondent contends that, to the extent *People v. Harrison* (1969) 1 Cal.App.3d 115 is consistent with *Neal v. State of California* (1960) 55 Cal.2d 11, it lends support for multiple punishment. (RBOM pp. 3; 11-15.) Finally, respondent argues separate punishment is proper under this Court decision in *In re Hayes* (1969) 70 Cal.2d. 604. (RBOM pp. 15-18.)

As explained below, none of respondent's theories are correct. The main problem with respondent's first assertion is that it fails to recognize that the analysis used for determining if section 654 permits separate

punishment is not coextensive with the analysis for determining criminal liability. And respondent's last two arguments are not persuasive because both *Harrison*, supra, 1 Cal.App.3d 115, and *Hayes*, *supra*, 70 Cal.2d 604 are distinguishable.

Respondent's primary contention is that Penal Code section 654 does not bar separate punishment for the conviction of possession of a firearm by a felon, and conviction for the concealment of a firearm in a public place because appellant possessed the firearm three days before concealing it in his car. (RBOM p. 8.) Noting that a violation of section 12021 is complete once the felon takes possession of the weapon, respondent claims that appellant's intent to possess the firearm was complete before the incident involving concealment. (RBOM pp. 8-9.) According to respondent, this shows appellant necessarily entertained a separate intent on the latter date. (RBOM 10.)

But section 654 can be applied even though one crime is technically completed before the other. Thus for example, in *People v. Guzman* (1996) 45 Cal.App.4th 1023, the court held that the imposition of concurrent terms for a burglary, robbery and grand theft was prohibited by section 654. In *Guzman*, a home owner saw several men burglarizing his garage. (*Id.* at p. 1025.) He drove after the perpetrators in an effort to reclaim his property,

and was able to corner them with his truck. (*Id.* at p. 1026.) When the victim got out of his vehicle to confront the men, they beat him and drove away. However, the victim was able to continue the pursuit until police detained the burglars. (*Ibid.*) On appeal, the defendant argued that grand theft and robbery were subject to Penal Code section 654. (*Id.* at p. 1027.) The Court of Appeal agreed:

> Miguel Guzman and his companions had not won their way to a place of temporary safety after the burglary when Hansen was beaten up when he attempted to thwart the burglars' escape. It was thus during the course of the ongoing burglary that Miguel Guzman used force on Hansen to retain the motorcycle. Such evidence supports a conclusion the burglary was still in progress when Miguel Guzman committed robbery and both offenses were committed pursuant to one objective and there was but a single continuous course of conduct. (*Id.* at p. 1028, citing *People v. Irvin* (1991) 230 Cal.App.3d 180, 184-185, and *People v. Estes* (1983) 147 Cal.App.3d 23, 28.)

So even though for the purposes of criminal liability, a burglary is complete after the perpetrator enters a structure with felonious intent (*People v. Montoya* (1994) 7 Cal.4th 1027, 1041-1042), the commission of the burglary did not terminate, for the purpose of a section 654 analysis, when the defendant's entered the premises. Rather, it continued until he made a clean departure from it.

Similarly here, the unlawful possession of the firearm did not terminate, for the purpose of a section 654 analysis, upon appellant's

control of the gun; rather, it continued until appellant's intended reason for possessing the weapon changed.

> "The key inquiry here is whether defendant's objective and intent in possessing the handgun on all three [days] were the same, thus making the crime one indivisible transaction subject only to one punishment under section 654. [Citation.] Section 12021 does not require any specific criminal intent; general intent to commit the proscribed act is sufficient. [Citation.] The act proscribed by section 12021 is possession of a firearm by a convicted felon. [Citation.] Possession may be either actual or constructive as long as it is intentional. [Citation.] 'The proof need not conform to the exact date laid in the information, it being sufficient to prove the commission of the offense at any time prior to the filing of the information within the statutory period– the commission of the act here charged is not the kind that does not constitute a crime unless committed on a specific date; time is not of the essence or a material ingredient of the offense....' [Citation.]"

(*People v. Sprilin* (2000) 81 Cal.App.4th 119, 130.) Despite the evidence that appellant obtained possession of the revolver three days before it was concealed in the car, there is no factual support for the determination that defendant's possession of firearm had a separate and individual purpose than his concealment of that same weapon. That the firearm did not suddenly materialize in appellant's hands at the time of the detention, and that he had possessed it for a few days before, does not support a reasonable inference that defendant ever possessed it with any other intent than to protect himself.

Respondent cites a line of cases which apply this court's holding in *People v. Bradford* (1976) 17 Cal.3d 2, 22-23, and consider whether the defendant's possession of the firearm was distinctly antecedent and separate from the primary offense. (RB 7-8 citing e.g., *People v. Jones* (2002) 103 Cal.App.4th 1139, *People v. Ratcliff* (1990) 223 Cal.App.3d 1401.) The problem with this argument, as noted by the Court of Appeal, is that these cases are so factually different they are not helpful. They involve situations "where a felon uses a gun to commit some crime with the gun." (Opinion, p. 5.) In *Jones*, *supra*, 103 Cal.App.4th 1139, the defendant used the gun in his possession to commit a shooting at an inhabited dwelling. (Id. at p. 1141.) In *Ratcliff*, *supra*, 223 Cal.App.3d 1401, the felon used the firearm to commit a robbery. (*Id.* at pp. 1404-1405.) Here appellant possessed a revolver and concealed it. This conduct is distinguishable because there was no "offense in which he *employ*[ed] the weapon." (*People v. Bradford*, *supra*, 17 Cal.3d at p. 22, emphasis added.) To employ means to put to use or service. Appellant never put the revolver to use. He simply concealed it. The act of concealment is not synonymous with employment. But concealment does subsume possession. One cannot conceal a weapon without also possessing it. As the prosecutor noted, "the case we presented to you was very brief, but what it did show was that on the date in question

Mr. Jones possessed the firearm in question. And that's why we've got him charged with being a felon in possession of a firearm, possessing a concealed firearm, possessing a loaded firearm." (1RT 109.)

Respondent faults both appellant and the Court of Appeal for relying on the prosecutor's argument in rejecting this theory. Respondent claims that the prosecution's charging decision or use of the evidence are not factors in a section 654 analysis. (RB 9.) Respondent's cites no authority for this assertion.

At least one court has recognized that section 654 issues can be the result of the prosecutor's charging decision. In *People v. Fuller* (1975) 53 Cal.App.3d 417, the court observed:

> The presence of these issues in an inordinate number of cases is attributable, in great measure, to the failure of prosecutors to tailor their pleadings to the facts and to the practice of over-pleading. . . . Too much precious time and effort is being expended by courts at all levels resolving problems arising in the application of Penal Code section 654. This time could be saved by judicious and thoughtful pleading on the part of prosecuting officials.

(*Id.* at p. 420, fn. 2.)

And courts often cite the prosecutor's closing arguments when conducting a section 654 analysis. (See e.g, *People v. Ortega* (2000) 84 Cal.App.4th 659, 666 ["as charged, as argued by the prosecution, and as found by the trial court, the act underlying the two felony counts was the

same one"]; *People v. Guzman, supra,* 45 Cal.App.4th 1023, 1028 [reliance on prosecutor's argument]; *People v. Brooks* (1985) 166 Cal.App.3d 24, 31 [reliance on prosecutor's theory of the case]; *People v. Hooper* (1967) 250 Cal.App.2d 118, 121 [court's reliance on information and argument].)

Respondent says that a section 654 analysis is limited only to the evidence produced at trial. (RBOM p. 10.) While it is true that, in jury trial cases, the trial court must consider the evidence adduced at trial, it cannot do so in such a manner that is inconsistent with what happened at trial. "At sentencing, a trial court must accept and rely upon the same factual basis which the jury unanimously selected and relied upon to convict the defendant on a particular count. Such a rule protects the defendant's federal and state constitutional rights to a jury trial and ensures that he or she is punished for only those offenses the jury found beyond a reasonable doubt that he or she committed." (*People v. Coelho* (2001) 89 Cal.App.4th 861, 876 [considering whether court had discretion to impose concurrent terms pursuant to Pen. Code, § 667, subd. (c)].) Although *Coehlo* was not a section 654 case, the same principle applies. In evaluating the evidence in order to decide a multiple-punishment issue under section 654, the trial court must not ignore the verdicts' factual underpinnings. In light of the evidence presented in this case, the court's instructions (including the

corpus delicti instruction and the lack of a unanimity instruction), and the prosecutor's closing argument, the jury's verdict on those counts represented a finding that there was a single criminal act or incident punishable by three separate provisions of law.

As an alternative argument, respondent says that *People v. Harrison*, *supra*, 1 Cal.App.3d 115, also supports the position that separate punishment is appropriate in this case. In doing so, however, even respondent acknowledges that *Harrison* is not wholly consistent with *Neal v. State of California*, *supra*, 55 Cal.2d 11. (RBOM p. 3.) Respondent also admits that "to the extent *Harrison* attempted to create a 'statutory purpose' test, it appears this Court has already rejected such a test in [*People v.*] *Britt*" (2004) 32 Cal.4th 944, 952. (RBOM p. 14.) Even so, respondent argues that per *Harrison*, appellant deserves greater punishment because of the additional act of concealment.[1] (*Ibid.*)

The problem with this approach is that it disregards this court's admonition not to "parse the objectives too finely" when conducting a

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[1] In *Harrison*, the court concluded that the separate act of loading the gun in addition to possessing it merited separate punishment. (*Id.* at p. 22.) In appellant's view, *Harrison* reached the wrong result on the facts. The *Harrison* court had "no evidence" before it "show[ing] that appellant personally loaded the pistol." (*Ibid.*) The cases requiring substantial evidence, rather than speculation, to support a finding for a section are numerous.

section 654 analysis. (See *People v. Britt*, *supra*, 32 Cal.4th at p. 953.) Respondent ignores the fact that one of appellant's offenses was a means toward the accomplishment of the other. Given the fact that appellant is prohibited from possessing a firearm, concealment was a means towards possession. It does not matter that each offense could be "accomplished" without the other.

Respondent also overlooks the fact that the legislative objectives underlying the "separate" criminal objectives posited by the Court of Appeal concern closely related provisions of law that are part of a single statutory scheme. *In re Hayes*, *supra*, 70 Cal.2d 604, noted that section 654 would preclude multiple punishment where the separate laws simultaneously violated serve similar aims. (*Id.* at p. 607 fn. 4.)

The Dangerous Weapons Control Act (Pen. Code § 12020 et seq.), of which both section 12021 and 12025 are a part, "is designed to minimize the danger to public safety arising from the free access to firearms that can be used for crimes of violence." (*People v. Scott* (1944) 24 Cal.2d 774, 782.) All of the offenses contained in the Dangerous Weapons Control Act are crimes for which a non-felon citizen can be charged except section 12021. Unless a person has been convicted of a felony, he cannot be

charged with a violation of that section. (*People v. Ratcliff* (1990) 223 Cal.App.3d 1401, 1409.)

To say there are such distinct objectives between the separate offenses in the Dangerous Weapons Control Act such that a defendant automatically merits separate punishment for each offense once again parses the objectives too thinly. As noted above, fundamental concern of the state in the statutory scheme is to keep the public safe from firearms.

In any event, as explained in Appellant's Opening Brief on the Merits at pages 17-18, the Legislature has already taken a defendant's status as an ex-felon within the various provisions of the statutory scheme by increasing punishment for several offenses based on that status. (See Pen. Code, § 12025, subd. (b)(4), § 12031, subd. (a)(2)(D).)

Respondent's final contention is that separate punishment for possession of a firearm by a felon and concealment of the same firearm is proper under *In re Hayes* (1969) 70 Cal.2d 604. In *Hayes*, a sharply divided court held that where a defendant commits two or more criminal acts which have the same non-criminal act in common, section 654 requires isolating the *criminal* acts involved and then to examine those acts for identity. The Court held that if the criminal acts are not identical, then the defendant may be punished for both. (*In re Hayes*, *supra*, 70 Cal.2d at p. 607.) Relying

on *Hayes*, respondent argues the neutral noncriminal common element of appellant's crimes was possession of the revolver. The criminal acts were possession by an ex-convict, and concealment of the weapon. (RBOM pp. 17-18.)

The holding in *Hayes* is not a basis to reject all other section 654 tests. At the outset the *Hayes* majority explained:

> "Our analysis herein is in no way intended to preclude application of the above tests where appropriate, any more than those tests themselves are mutually exclusive. It is only because we find all the foregoing formulae inapplicable that we resort to the present approach. If under any of the enunciated tests the proscription of section 654 applies, a contrary result under another test is irrelevant."(*In re Hayes*, *supra*, 70 Cal.2d at p. 606, fn. 1) The *Hayes* court created the new test because it deemed the other section 654 tests were of limited use in that case. (*Id.* at p. 606.)
>
> "The court in *Hayes* did not intend to state a rule that in every case where a noncriminal act (e.g., [possession of a firearm]) coincides with the simultaneous accomplishment of two separately punishable criminal acts and the commission of one such act is the means of effecting the other, and where the single intent and objective test can therefore be applied -- as it has been applied since *Neal* in many opinions -- such test must be rejected and double punishment permitted. What the court did hold was that when two simultaneous but unrelated criminal acts have in common a noncriminal act (and purpose), they may be separately punished."

(*People v. Wren* (1969) 271 Cal.App.2d 788, 797 (dis. opn. of Pierce, P.J.)

As discussed at pages 27-33 of Appellant's Opening Brief on the Merits, in this case there are two Supreme Court tests which are applicable

and dispositive. So, this court need not resort to the *Hayes* "criminal acts" test. Under *Neal*, *supra*, 55 Cal.2d 11, appellant had a single intent and objective when he violated the two statutes, he possessed the concealed gun for protection. And under *Bradford*, *supra*, 17 Cal.3d 8, even though appellant possessed the gun before it was concealed in the car, the concealment was not "distinctly separate" from the primary offense or was the weapon "employed" to commit another offense; rather the concealment was "only in conjunction" with the primary offense of possession. Thus, under either test, separate punishment violates Penal Code section 654.

CONCLUSION

Nothing in the record supports an inference that appellant had separate intents with respect to possession of the revolver. To speculate that he had multiple intents because it was found concealed in his possession three days later, rather than the simple intent to possess the gun for protection, would "parse[] the objectives too finely." (*People v. Britt*, *supra*, 32 Cal.4th. at p. 953.) Count two should have been stayed under section 654.

Dated: November 3, 2010

Respectfully Submitted,

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CERTIFICATE OF LENGTH

I, Sandra Uribe, counsel for appellant, certify pursuant to the California Rules of Court, that the word count for this document is 3118 words, excluding the tables, this certificate, and any attachment permitted under rule 8.360(b)(1). This brief therefore complies with the rule which limits a computer-generated brief to 25,500 words. This document was prepared in Word Perfect, and this is the word count generated by the program for this document.

I certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed, at Sacramento, California, on November 3, 2010.

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DECLARATION OF SERVICE

I, the undersigned, declare as follows:

I am a citizen of the United States, over the age of 18 years and not a party to the within action; my business address is 2407 J Street, Suite 301, Sacramento, CA 95816.

On November 3, 2010, I served the attached

APPELLANT'S REPLY BRIEF ON THE MERITS

by placing a true copy thereof in an envelope addressed to the person(s) named below at the address(es) shown, and by sealing and depositing said envelope in the United States Mail at Sacramento, California, with postage thereon fully prepaid. There is delivery service by United States Mail at each of the places so addressed, or there is regular communication by mail between the place of mailing and each of the places so addressed.

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